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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 302

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, ET AL., ETC.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, ET AL., ETC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLEE MILWAUKEE GAS LIGHT COMPANY

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BRIEF OF APPELLEE MILWAUKEE GAS LIGHT COMPANY

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Appellees.

BRIEF OF APPELLEE MILWAUKEE GAS LIGHT COMPANY

This is an appeal from a judgment entered on June 14, 1950 in the United States District Court for the Eastern District of Wisconsin, Circuit Judge F. Ryan Duffy and District Judges Patrick T. Stone and Robert E. Tehan sitting, dismissing an action for a permanent injuction against the enforcement of Subchapter III of Chapter 111, Wisconsin Statutes, 1947, which is a public utility anti-strike law, and for a judgment declaring said subchapter void and repugnant to the United States Labor-Management Relations Act of 1947, and to the Constitution of the United States.

A like action had been commenced for like relief in the Circuit Court for Milwaukee County, Wisconsin on September 3, 1948. On January 6, 1949, a judgment was entered in the state court action holding the act valid and constitutional. That judgment was affirmed by the Supreme Court of Wisconsin on July 12, 1949.

In the action at bar, the defendants, after answering generally, pleaded the state court judgment as *res judicata.*

On April 28, 1950, the District Court sustained that defense and entered judgment dismissing the action.

OPINION BELOW

The opinion of the U. S. District Court for the Eastern District of Wisconsin, three judges sitting, is reported at 90 F. Supp. 347. It is printed at record pages 59-66, followed by a dissenting opinion at pages 67-75.

JURISDICTION

The judgment of the District Court was entered on June 14, 1950 (R. 84). The jurisdiction of this court is invoked under Section 1253, Ch. 81, Tit. 28, U.S.C.A.

STATUTES INVOLVED

Appellants' attack is centered on Subchapter III of Chapter 111, Wisconsin Statutes, 1947.

That has been referred to by the Wisconsin Supreme Court as the "public utility anti-strike law." (*Wisconsin Employment Relations Board vs. Milwaukee Gas Light Company, et al,* 258 Wis. 1, at 2, advance sheets, 44 N.W. (2d) 547, 548, advance sheets, now before this Court

(No. 438) for argument to follow the case at bar and two others.)

The act is printed in part in Appellants' Brief Appendix "A" at pages 18 to 20.

Appellants omit sections 111.50, declaration of policies; 111.57, arbitrator to hold hearings (which covers not only procedure but prescribes the affirmative standards); 111.58, two restrictions with reference to standards; 111.59, filing arbitrators' order with clerk of circuit court (note not with board); period effecting; retroactivity; 111.60, judicial review of order of arbitrator; and 111.61, board to establish rules.

We assume that the failure to print these sections means that they are not attacked. If they are valid, the act as a whole is valid.

This act is a subchapter of Chapter 111, which is entitled "Employment Relations."

We think that the act cannot properly be considered piecemeal, nor entirely out of its setting. In order that the court may have it available at one place, we print it in full as Appendix A in this brief.

QUESTIONS INVOLVED

1. Is the judgment appealable under Section 1253 in view of the fact that, as we submit, it neither grants nor denies either an interlocutory or a permanent injunction?

2. Had not the demand for an injunction been abandoned before the entry of the judgment?

3. Has not the entire controversy been settled, and is not this case now moot?

4. Had not the validity of the Wisconsin public utility anti-strike law and its binding effect on the plaintiffs become *res judicata* prior to the commencement of the action at bar under that certain judgment of the Circuit Court for Milwaukee County, Wisconsin entered on January 6, 1949, which was affirmed by the Supreme Court of Wisconsin in *United G., C. & C. Workers vs. Wis. E. R. Board,* 255 Wis. 154, 38 N.W. (2d) 692?

5. If the state court judgment be not conclusive under the doctrine of *res judicata,* would not the District Court, under the pleadings and the undisputed facts, have been compelled to enter the same judgment which it did in fact enter?

It would have been proper to discuss these questions in the order set forth. However, we think it more helpful to consider questions 4 and 5 at the outset in connection with our answer to the appellants' brief.

ARGUMENT

I.

THE ARGUMENT THAT THE STATE COURT JUDGMENT WAS ERRONEOUS AB INITIO AND COULD NOT BE RES JUDICATA PRESENTS NO FEDERAL QUESTION

This argument appears at pages 7 to 10 of Appellants' Brief. Reduced to its last analysis, the proposition contended for is that the Wisconsin courts erred in stating the Wisconsin law. That presents no federal question.

What is the correct procedure, so long as there is no denial of due process, is for the state, and presents no federal question.

We are unable to follow counsel in the statement that, when a court sustains a general demurrer, it says, in effect, that there is no controversy (p. 7). On the contrary it adjudicates a controversy.

At pages 8 and 9 counsel call attention to the judgments entered in the two state court actions; one in which the defense of *res judicata* was sustained, and one involving another utility (*Amalgamated Ass'n. of Street, E. R. & C. Employees vs. Milwaukee Electric R. & T. Co.,* 255 Wis. 163); and assert that "if the judgment in one case was erroneous, then the judgment in the companion case was erroneous" (p. 9); and that "the District Court based its decision of *res judicata* on what we believe to be an erroneous judgment. * * *" If there had been error, it would not have presented a federal question.

The place for its correction would have been in the state courts. But counsel should have directed the court's

attention to the fact that the Wisconsin Supreme Court has in three later cases approved the decision in the first Gas Company case.

Wisconsin E. R. Board vs. Amalgamated Asso., 257 Wis. 43, advance sheets, 42 N.W. (2d) 471;

Amalgamated Asso. vs. Wisconsin E. R. Board, 257 Wis. 53, advance sheets, 42 N.W. (2d) 477;

Wisconsin E. R. Board vs. Milwaukee G. L. Co., 258 Wis. 1, advance sheets, 44 N.W. (2d) 547, advance sheets.

If any federal question had arisen in the first of the Gas Company cases, it could have been presented on a review of the judgment therein in this Court. No such review was sought.

II.

THE VALIDITY OF THE WISCONSIN PUBLIC UTILITY ANTI-STRIKE LAW BECAME RES JUDICATA UNDER A STATE CIRCUIT COURT JUDGMENT WHICH WAS AFFIRMED ON APPEAL

To quote from *United States v. Munsingwear, Inc.*, 340 U. S. 36, at 38, advance sheets,

> "We start then with a case which falls squarely within the classic statement of the rule of *res judicata* in *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48-49:
>
> > 'The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and

> even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.' "

This question is discussed in Appellants' Brief under heading II at pages 11 to 14.

(a) A Declaratory Judgment, in Most Cases, is Intended to be Prospective in Its Operation.

There is no challenge as to identity of parties.

The only challenge is as to the identity of issues. That challenge is based solely on the ground that the complaint contains ten allegations which refer to "overt acts occurring nine months after the Circuit Court action was decided" (pp. 11 and 12). The answer is that the rights and duties of the parties existing whenever that state of facts might arise had already been adjudicated. A declaratory judgment, in most cases, is, and is intended to be, prospective in its operation.

Before entering upon this branch of the argument, it should be observed that this case was tried and submitted to the District Court on all the issues, of which *res judicata* was but one. *(Amended Complaint, R. 1-10; Answer of Milwaukee Gas Light Company, R. 10-30; Answer of State Official Defendants, R. 30-33; Stipulation as to Facts, R. 34-47).*

(b) District Court's Opinion Clear and Direct.

The reasons for sustaining the defense of *res judicata* are clearly and directly stated in the majority opinion by

Circuit Judge Duffy. The reasoning is, we think, unanswerable. It will be found a helpful introduction to a consideration of the case. (R. 59)

(c) Comparison of Pleadings in State and District Courts Demonstrates Identity of Issues.

The amended complaint herein opens with this statement:

> "1. This is a suit of a civil nature seeking an injunction *and a declaratory judgment,* and arises under the Constitution of and the laws of the United States." (R. 1.)

The prayer for judgment is that:

> "(d) That the court issue a permanent injunction enjoining and restraining the defendants and their agents from taking steps to enforce the penalties of sub-chapter 3, Chapter 111 of Wisconsin Statutes of 1947, or other provisions thereof, which interfere with the rights of the plaintiffs as citizens of the United States, and which are in conflict with the laws of the United States and the Constitution of the United States.
>
> "(e) This court issue a judgment declaring that the provisions of sub-chapter 3, Chapter 111 of the Wisconsin Statutes of 1947, insofar as they may be applied to penalize these plaintiffs and others for whom they are authorized to act, to compel them to submit to arbitration on any negotiable issue or which has for its purpose the punishment of the plaintiffs for having left their place of employment in concert or in agreement with others, or for having picketed the defendant company's premises, are void, illegal, unenforceable and repugnant to the United States Labor-Management Relations Act of 1947, and to the Constitution of the United States.

"(f) The plaintiffs have such other and further relief as to the court may seem just and equitable." (R. 12 and 13)

The granting of subdivision (e) of the prayer of the amended complaint in this action would be a condition precedent to the granting of any relief to the plaintiffs.

The defendants, in addition to putting in issue the allegations of the amended complaint, pleaded that the plaintiffs, prior to the commencement of the action at bar, chose as their forum for the litigation of the same issues, the Circuit Court for Milwaukee County, Wisconsin, in an action in which a *judgment* was entered declaring the statute valid, and denying relief sought in all other respects.

See Gas Company answer (R. 17, pars. 19 and 20, R. 20, and par. 22, R. 21 to 24).

The complaint in the state court action appears at Record pages 25 to 28.

The judgment therein appears at Record pages 28 to 30.

The identity of the issues will be apparent on a comparison of the complaints, and particularly the prayers, in the two actions.

The prayer for relief in the state court action reads as follows:

"*Wherefore* plaintiff prays that the court determine and declare the rights of the parties, and declare sub-chapter III of Chapter 111 of the Laws of 1947, Wisconsin Statutes, unconstitutional and invalid, and give such further relief as may be lawful, just and proper, by way of declaration of the rights of the parties." (R. p. 28)

(d) Scope of Wisconsin Declaratory Judgments Act and Scope of the Issues Tried in the State Court.

Under Wisconsin's declaratory judgments act, courts of record have "power to declare rights, status and other legal relations whether or not further relief is or could be claimed." The declaration may be "either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." Any person whose "rights, status or other legal relations are affected by a statute * * * may have determined any question of construction *or validity* arising under the * * * statute * * * and obtain a *declaration of rights, status or other legal relations thereunder.*"

Sec. 269.56, Wisconsin Statutes.

A fuller quotation will be found in Appendix B, infra.

The plaintiffs in the state court asked relief under this declaratory judgments act.

In his decision therein, Circuit Judge Daniel W. Sullivan said:

> "The above entitled actions are brought pursuant to Section 269.56 Stats. for a declaration of the rights, status and legal relations of the parties under Chapter 414, Laws of 1947 (Sub. chap. III of Chap. 111, Stats.), relating to compulsory arbitration of labor disputes in public utility industries, and for a declaration that said Act is unconstitutional." (R. 48)

He also said:

> "The facts alleged satisfactorily show (1) a justiciable controversy, (2) adverse interests of the parties plaintiff and defendant, (3) a legally protectible interest on the part of each of the plaintiffs, and (4) that the issues are ripe for judicial determination. *State ex rel. LaFollette v. Dammann,* 220 Wis. 17." (R. 49)

Speaking of the plaintiffs' contentions, he said in part:

"Plaintiffs contend:

"1. That Chap. 414, Laws of 1947, violates the 'due process of law' and the 'equal protection of the laws' provisions of the XIV Amendment to the Constitution of the United States.

"2. That it likewise violat s the 13th Amendment in that it imposes 'involuntary servitude' upon the plaintiffs.

"3. That it impairs the obligations of contract, contrary to Sec. 10, of Article I.

* * *

"7. That the law is in conflict with the National Labor Relations Act, as presently amended (known as the Taft-Hartley Act).

* * *" (R. 51)

He closed with the direction: "*Judgments* may be entered declaring the rights and status of the parties in accordance with the foregoing." (R. 59)

(e) The Judgment in the State Court Covered All Issues in the Action at Bar.

The decision was filed on December 30, 1948 (R. 48).

The judgment, which was entered on January 6, 1949, omitting recitals and signature, reads as follows:

"It Is Hereby Adjudged and Determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947, and does not deny to the plaintiffs

nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, and does not deprive them of, any rights, privileges or protection secured to them under either of said constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947.

"It Is Further Adjudged that the prayer of the plaintiffs in the above entitled action for further relief be and the same hereby is denied." (R. 29-30)

An appeal was taken from that judgment to the Supreme Court of the State of Wisconsin, and that court affirmed the judgment on July 12, 1949. It was a final judgment; and if any federal question could have been presented, it was subject to review by this Court. *No such review was sought; and it is just as final and conclusive as if it had been presented to this Court and affirmed.*

If that action had been commenced in the District Court, and that judgment had been entered, we submit that the District Court would not have entertained the present action. It would have been dismissed for the reason that the issues had already been adjudicated.

The only difference in the situation now presented is that that judgment was entered in the Circuit Court for Milwaukee County in the State of Wisconsin. That is a court of general jurisdiction. The District Court has no broader jurisdiction. That jurisdiction in Wisconsin is vested by the Constitution of that state; and even the Legislature is powerless to restrict it.

Had the case been tried originally in the District Court, and on the District Court record, a judgment cast in the

language of the State Court judgment would have been responsive to the pleadings and the record.

(f) The Validity of the First State Court Decision is Itself Res Judicata Under Later Decisions in the State.

The Wisconsin Supreme Court has reaffirmed its decision of July 12, 1949 in several different cases.

On May 2, 1950, the court said:

> "Since we *have held* in *United G., C. & C. Workers v. Wisconsin E. R. Board*, 255 Wis. 154, 38 N.W. (2d) 692, and *do now hold* the statute to be constitutional, the final contention of the defendants that the several sections thereof are not severable need not be determined." [Italics supplied]

Wisconsin E. R. Board v. Amalgamated Asso., 257 Wis. 43, at 52, advance sheets, 42 N.W. (2d) 471.

See also:

Amalgamated Asso. v. Wisconsin E. R. Board, 257 Wis. 53, advance sheets, 42 N.W. (2d) 477.

On November 8, 1950, the court said:

> "The union asserts that subch. III of ch. 111, Stats., conflicts with the Federal Labor Management Relations Act of 1947, 29 USCA, sec. 141 et seq., and violates the state and federal constitutions.
>
> "The constitutionality of the public utility anti-strike law was questioned in a previous action in this court. *United G., C. & C. Workers v. Wis. E. R. Board* (1949), 255 Wis. 154, 38 N.W. (2d) 692. *The law has been held to be a proper legislative enactment.*" [Italics supplied]

Wisconsin E. R. Board v. Milwaukee G. L. Co., et al, 258 Wis. 1, 44 N.W. (2d) 547, 550, advance sheets.

These decisions leave no room for debate as to the force and effect of the particular state court judgment relied upon in support of the defense of *res judicata*.

This last decision is itself *res judicata* as to the effect of the judgment involved in the first.

The latest of these is now before this Court as No. 438 on the current calendar, to be heard following the argument in the case at bar, and in two other cases involving another utility.

These decisions indicate the force and effect in Wisconsin *of this particular judgment*.

Under principles long recognized, the same force and effect would have been given thereto in the absence of any specific ruling.

(g) Former Judgment Conclusive on all Issues which might have been litigated.

The judgment in the former action is conclusive not only as to matters which were actually litigated therein, but as to matters which might have been litigated therein.

Werner v. Riemer, 255 Wis. 386-406, 39 N.W. (2d) 457-468, at 465, 466 (1949);

Kuchenreuther v. Chicago, M. St. P. & P. R. Co., 225 Wis. 613, 615, 275 N.W. 457 (1937);

Grunert v. Spalding, et al, 104 Wis. 193, 213, 214, 79 N.W. 606 (1899).

(h) Doctrine of Res Judicata in Wisconsin.

The doctrine of *res judicata* applies in Wisconsin.

Reinkey v. Wilkins, 172 Wis. 515, 520, 179 N.W. 751.

The doctrine of estoppel by record prevents a party, not only from litigating again what was actually litigated in the former case, but from litigating *what might have been litigated therein.*

Kuchenreuther v. Chicago, M., St. P. & P. R. Co., 225 Wis. 613, at 615, 275 N.W. 457 (1937).

The final adjudication is conclusive, in a subsequent action between the same parties, as to all matters which were litigated or *which might have been litigated* in the former proceedings.

Werner v. Riemer, 255 Wis. 386, at 403, 39 N.W. (2d) 457.

It is not necessary to rely merely on the full faith and credit clause of the United States Constitution. On general principles of *res judicata,* the District Court was bound by the judgment of the state court.

Angel v. Bullington, 330 U. S. 183, at pp. 192-193, 91 L. Ed. 832;

Treinies v. Sunshine Mining Co., et al, 308 U. S. 66, 75-78, 84 L. Ed. 85;

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231.

A prior judgment is a finality as to the claim or demand in controversy, concluding the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 282, 90 L. Ed. 1231, 1239;

Grubb v. Public Utilities Comm., 281 U. S. 470, at 479, 74 L. Ed. 972.

And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree.

Jackson v. Irving Trust Co., 311 U. S. 494, 503, 85 L. Ed. 297.

This is a field in which the doctrine of *res judicata* should have the most complete operation. If a judgment in an action for declaratory relief is not *res judicata* as between the parties, the statute providing therefor is an empty gesture.

Moreover, if a judgment in a class action is not *res judicata* as to the persons represented by a party or parties authorized to sue or defend and actually suing or defending in their behalf, then no such action ought to be permitted.

(i) Full Faith and Credit due to State Court Judgment.

The force and effect of the judgment in the State of Wisconsin having been determined, it must be accorded that same force and effect in all federal courts. As stated in the majority opinion in the District Court,

> "The full faith and credit clause of the United States Constitution (Art. IV, Sec. 1) applies to federal courts. 28 U.S.C. 7138. Federal courts are required to give full faith and credit to the judgments of State courts. *Davis v. Davis*, 305 U. S. 32, 39-40." (R. 66)

These considerations call for an affirmance of the judgment.

We submit, however, that on this record the same judgment would have been called for had the issue of *res judicata* not been in the case.

III.

THE WISCONSIN PUBLIC UTILITY ANTI-STRIKE LAW IS VALID

If this law is valid, then, for that reason alone, the judgment of dismissal should be affirmed.

If there had been no prior action, and if the District Court had found the law valid, a judgment cast in the form of the state court judgment would have been proper.

Counsel for appellants raises the questions whether this act violates the 13th and 14th Amendments to the Federal Constitution, and whether it is in conflict with the Labor-Management Relations Act of 1947 (Appellants' Brief, p. 4).

The purpose to press these questions is not wholly clear from the specification of errors (p. 6). Division II of the argument (pp. 11 to 14) is devoted to *res judicata.* Division I (pp. 7 to 10) deals with *res judicata,* but suggests going beyond that. Division III (pp. 14 to 17) discusses conflict with the federal law, in a measure at least, as though there had been no prior trial of the original issues.

This case was fully tried on an agreed statement of facts (R. 34) supplemented by one item of evidence, the decision of the trial judge in the state court action (R. 48 to 59). *There is no disputed fact.*

If the District Court had not sustained the defense of *res judicata,* or, if this Court were to take the view that the District Court erred on this point, we submit that the act was none the less valid and that, on the record as a whole, a judgment of dismissal (R. 85) would still have been called for. For that reason the judgment should be affirmed.

A.

Purpose of Law to Insure against Interruption of Essential Services and to Promote Public Safety as well as Service.

In 1939, Wisconsin enacted an "Employment Peace Act." In 1945, it enacted a "Fair Employment" act. These are Subchapters I and II of Chapter 111, which is entitled "Employment Relations."

In 1947 it added thereto Subchapter III under the title Public Utilities. It might well have been entitled Public Utility Employment Relations Act. The Supreme Court of the state has called it "the public utility anti-strike law."

Its purpose is clear. That purpose was to insure the public against any "interruption of the supply of an essential public utility service" (Sec. 111.50). To accomplish that purpose the state imposed on the parties to labor disputes in the public utility field the duty to resolve all such disputes by good faith collective bargaining, and by providing that, in the event of an impasse or stalemate, strikes and lockouts should be forbidden, and that the parties should first be required to resort to conciliation under the direction of the Wisconsin Employment Relations Board (created under Sec. 111.03 in Subchapter I); and that, in the event that the stalemate still

continued, they should be required to submit the dispute to arbitrators chosen from a list prepared by the Board. The award of the arbitrators, which is subject to judicial review (Sec. 111.60), is to be filed in the office of the clerk of the circuit court, and is to continue in force for a period of one year (Sec. 111.59).

Notwithstanding any award, the duty of the parties to attempt to resolve the dispute by agreement continues, and any agreement reached supersedes the award.

B.

Due Process Rights Inhere in the Individual; but Trial by Combat has no Constitutional Guarantee.

There runs through the theory of due process of law the idea that fundamentally a right belongs to an individual, *qua* individual. Thus, in the case of labor, the right which originally existed was the right of an individual laborer to contract as to the terms and conditions under which he would work. After the adoption of the Fourteenth Amendment, this right was translated into the idea of freedom of contract. It was early recognized, however, that the right to contract was a hollow right to the average laborer due to the inequality of his bargaining power as compared to that of his employer. Accordingly, it was soon recognized that individual laborers should be permitted to organize and to bargain as a group with the employer, in order to more nearly equalize the bargaining positions. Even this proved not to afford enough power to the laborers, and they were soon permitted to engage in such concerted activities as strikes, boycotts, and picketing to insure that they would be dealt with fairly. Thus, the original right to contract was bol-

stered by legal recognition of the right to carry on activities which would aid the effective exertion of the original right. It was this transition from an original right of an individual to contract to his right to engage in certain concerted activities with others which perhaps prompted Mr. Justice Brandeis in his dissenting opinion in *Duplex Company vs. Deering,* 254 U.S. 443, 488, 65 L.Ed. 349, (1921) to say:

> [254 U.S. 488] "Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

Certainly the right to picket peacefully comes under the protection of the Fourteenth Amendment, though, as will appear later, it may be confined in scope by a state, and we do not contend here that the right to strike is not ordinarily protected by that same amendment. cf. *N. L. R. B. vs. Fansteel Corp.*, 306 U.S. 240, 256, 83 L.ed. 627 (1939). What we do contend is, however, that, as Mr. Justice Brandeis suggests, there may arise such conditions

in a particular industry that those who engage in it "cannot continue their struggle without danger to the community." Where such dangers arise, it presents one of the instances where a reasonable exercise of the police power of a state may limit rights otherwise protected by the Fourteenth Amendment, such limitation being in the interests of the general welfare of the people which the state has been established to protect.

This gradual translation from an individual right of contract to group rights, which latter were recognized as necessary for the successful attainment of the object of the individual right, should not be considered as involved in the theory of involuntary servitude under the Thirteenth Amendment. The right to be free from the oppression of involuntary servitude resides in the individual, *qua* individual. It was inevitable that in their progress towards organization, laborers should have adopted the democratic process of majority rule in their trade unions. It could not seriously be suggested that the fact that the minority of a bargaining unit must by statute work under terms which are not to their liking imposes involuntary servitude. Just as the minority submit to the demands of the majority, so the entire unit must defer to the interests of the public. Involuntary servitude has remained an individual concept, and rightly so.

It cannot be stressed too strongly that *only the methods of trial by combat are prohibited by Subchapter III.* There is no conflict between this law and the provisions of the Labor-Management Relations Act of 1947 (hereinafter termed the "Taft-Hartley Law"). If the state may pass legislation prohibiting strikes without otherwise violating constitutional prohibitions, the Taft-Hartley Law does not limit such legislation. The right to bargain collectively is fully recognized. Thus, section

111.52, Wis. Stats., places a duty upon employers and employees to exert all reasonable efforts to settle disputes through collective bargaining. It is only when the processes of collective bargaining have reached an impasse and stalmate that provision is made for conciliation and arbitration. Section 111.50, Wis. Stats. In addition, the order of the arbitration board, which may be made only after an adequate hearing and from which judicial review is afforded, see section 111.60, Wis. Stats., may be supplemented by agreements between the parties and may be changed by similar agreements. Section 111.59, Wis. Stats.

C.

Certain Well Recognized Rights of Labor are not at Issue.

It is essential at the outset to narrow the scope of the questions at issue before the court. Certain rights of labor are not questioned here.

1. *Right to organize.* The right of workers to organize for a lawful purpose has not been questioned in this country since the middle of the nineteenth century.

Commonwealth vs. Hunt, 45 Mass. 111 (1842);

See

American Foundries vs. Tri-City Council, 257 U. S. 184, 209, 66 L.Ed. 189 (1921);

63 *C.J., Trade Unions,* §4;

4 *Restatement of Torts,* §§784-796.

Among those purposes is that of collective bargaining.

See

N. L. R. B. vs. Jones & Laughlin Steel Corp., 301 U.S. 1, 33, 81 L.Ed. 893 (1937).

2. *Right to Picket.* It is also well settled that peaceful picketing falls under the protection of freedom of speech afforded by the Fourteenth Amendment.

Thornhill vs. Alabama, 310 U.S. 88, 84 L.Ed., 1093 (1940);

American Federation of Labor vs. Swing, 312 U.S. 321, 85 L.Ed. 1145 (1941).

3. *Right to Strike.* The strike has long been recognized as a lawful weapon to be used by workers in their struggle for economic power.

See

American Foundries vs. Tri-City Council, 257 U.S. 184, 209, 66 L.Ed. 189 (1921);

Society of New York Hospital vs. Hanson, 59 N.Y.S. (2d) 91, 95 (N.Y. Sup. Ct. 1945);

4 *Restatement of Torts,* §797.

4. *Right to Contract.* It is not questioned that a group of individuals has a right to contract with an employer as to wages and terms and conditions of employment.

J. I. Case Co. vs. N. L. R. B., 321 U.S. 332, 336-339, 88 L.Ed 762 (1944);

Wolff Co vs. Industrial Court, 262 U.S. 522, 534, 67 L.Ed. 1103 (1922).

D.

What is at Issue is the Extent to which Particular Rights may be limited by the exercise of the State Police Power.

None of the four rights enumerated above is immune from legislative limitation. Thus, organizations must be entered for a lawful purpose.

> *Plant vs. Woods,* 176 Mass. 492, 57 N.E. 1011 (1900);

See

> *International Union vs. Wisconsin E. R. Board,* 250 Wis. 550, 563, 27 N.W. (2d) 875 (1947).

The state may limit the extent to which peaceful picketing may be carried on.

> *Giboney vs. Empire Storage and Ice Company,* 336 U.S. 490, 93 L.Ed. 834 (1949);
>
> *Carpenters and Joiners Union of America vs. Ritter's Cafe,* 315 U.S. 722, 86 L.Ed. 1143 (1942).

The purpose of a strike must be lawful.

> *Dorchy vs. Kansas,* 272 U.S. 306, 71 L.Ed. 248 (1926);
>
> *Arthur vs. Oakes,* 63 Fed. 310 (1894).

And the strike must not be furthered by unlawful means.

> *N. L. R. B. vs. Fansteel Corp.,* 306 U.S. 240, 83 L.Ed. 627 (1938).

Both the right to strike and the right to contract may be limited by a state in the interests of the general welfare. They are not absolute rights.

International Union, U.A.W., A.F. of L., Local 232 vs. Wisconsin E. R. Board, 336 U.S. 245, 93 L.Ed. 510 (1949);

Wolff Co. vs. Industrial Court, 262 U.S. 522, 534, 67 L.Ed. 1103 (1923).

See

Dorchy vs. Kansas, 272 U.S. 306, 311, 71 L.Ed. 248 (1926).

The basic question, therefore, is whether the prohibition of strikes and the requirement that disputes be submitted to arbitration in the public utility field is a valid exercise of the police power of the state, where the prohibition and the compulsion are limited, on the one hand, to situations in which a strike or slowdown would cause a stoppage of essential service, and, on the other hand, to situations where a continuation of the dispute would be likely in the judgment of the Wisconsin Employment Relations Board to lead to a stoppage of essential service.

E.

Dangerous Consequences of Stoppage of Essential Public Utility Services.

Subchapter III defines "essential service" as the furnishing of—

> "* * * water, light, heat, gas, electric power, public passenger transportation or communication * * * to the public * * *" [111.51(2), Wis. Stats.]

It requires no stretch of the imagination to comprehend the calamitous results of a stoppage of any of the essential services enumerated above.

Many cities are dependent for their *water supply* on privately owned utilities. If such a plant were compelled

to cease operation, citizens would be wholly deprived of drinking water, or be compelled to drink unsanitary water; sewage facilities would be practically eliminated; most foods could not be prepared; health would deteriorate due to the inability to maintain cleanliness, sterilization or adequate sewage disposal; heating facilities, a large number of which depend on hot water or steam, would become unusable; and steam-driven machinery would become idle.

For the purposes of illustration of the effects of the interruption of *gas service,* we take the situation presented in connection with the Milwaukee Gas Light Company. In the Milwaukee area it is the exclusive agency for the production and distribution of gas and the service of gas-consuming appliances. The total franchise area served exceeds 500 square miles. The municipalities served are the citizens of Milwaukee, West Allis, Wauwatosa, West Bend, Port Washington, Hartford, and the villages of Shorewood, West Milwaukee, Whitefish Bay, River Hills, Fox Point, Butler, Menomonee Falls, Grafton, Slinger, Thiensville, Germantown, Saukville and Jackson, and the townships between Milwaukee and the out-lying cities and villages. The total population of the area served is nearly 800,000. The number of customers exceeds 200,000. (R. 39-40)

When the Union orders the men out, the Company is faced with an emergency which it can meet only by an effort to maintain the gas pressure in the mains, and by asking gas users to shut off their meters. That becomes necessary because the Company has been deprived of all power to direct the men upon whom it would ordinarily depend for that service. If the strike continues, the service may be interrupted for weeks, and possibly months. There will be constant danger of explosions.

If the gas be shut off for a substantial period, service to every meter must be cut off. It cannot with safety be turned on again without checking at every meter, and beyond it to every gas appliance served through it. Every pipe must be purged of air. That operation would take weeks, and, in many cities, months. In the meantime, the users would be deprived of fuel. Homes are not equipped with any substitute. That means starvation to many. How many infants, invalids and aged might perish it would be hard to estimate. Hospitals would be as helpless as homes and industrial plants. *There is no difference in the consequences between this and the destruction of a gas plant by a bomb dropped by an enemy plane.* Those who enter the employ of the utility take over the duty of guarding the plant and the users. A strike may be as serious as an act of war. If some desperate character, by stealth, were to destroy such a plant, he would be prosecuted as a criminal. *The deaths resulting from the cutting off of service by any other means would be just as real.*

The seriousness of the situation presented in connection with the strike involved in the action at bar is indicated by the following language which appears in the opinion of the Supreme Court of the State of Wisconsin in the contempt action which grew out of that strike:

> "At 11 a.m. the public was advised to curtail consumption of gas and an appeal to consumers of gas was made to shut off the service; the steam pressure dropped to zero in the boiler room and no further pumping could be done with the main pumping facilities; the fires had to be pulled from the boilers reducing the steam pressure, and all facilities had to be stopped; a minimum pressure in the distribution system was kept in order that the air would not get into the mains so as to prevent any explosions due to the mixture of gas and air in the distribution sys-

tem; the send-outs dropped to twenty-five percent of what they had been previously. Low pressure in the system created a dangerous condition fraught with the possibility of infinite injury to the public. The public was advised by radio broadcasts and through the newspapers to shut off appliances and to shut off the service at the meter. The service was no. resumed until October 6, 1949."

Wisconsin E. R. Board v. Milwaukee G. L. Co., 258 Wis. 1, 44 N.W. (2d) 547, advance sheets (No. 438 in this Court).

A strike in an electric power utility may cripple factories dependent upon electric power, public water departments, sewage disposal plants, street lights, traffic control signals, fire and police alarms, street cars and trackless trollies, booster pumps for fire protection, and many other facilities.

The court may take notice of what may occur in any metropolitan area—

If *gas service* should be stopped, cooked food and hot water would be unknown in many homes and even in hospitals; a large number of homes would be without heat; most foundries and many other factories would shut down for lack of heat processes; gas refrigeration would be impossible; and, due to the inability of the utility to furnish men to service the countless individual gas outlets, an ever present danger of explosions would exist.

If *electric power* were to be cut off, most machinery would become idle; a major part of the transportation system would become useless; many dependent on electricity for cooking and water heating would be unable to prepare foods and would be without hot water; lighting facilities would be eliminated everywhere, with par-

ticularly serious results in hospitals and similar critical places; most refrigeration would be impossible; tall office buildings would close for lack of elevators; the water supply to those dependent on booster pumps for pressure would be reduced or cut off; proper sewage disposal would be impossible; hot-air heating devices dependent on forced drafts, as well as oil-burning furnaces and stokers, would be useless; communication systems would be cut off; and numerous other species of public paralysis would result.

If the *public transportation* of any area were to come to a standstill, the normal activities of that area would come virtually to a standstill with it; countless man hours would be lost, and with them the wages on whose continuity the majority are dependent for their livelihood; industries, including the other public utilities, would be compelled to curtail their operations, and might be compelled to shut down entirely, thus tending to cause the very stoppages of other essential service which this law is designed to prevent; and private facilities for transportation would be swamped by the use of such facilities by all who were able to do so.

Finally, the cutting off of means of communication would cause serious dangers to health and safety in a society which is adjusted to and consequently dependent on modern means of communication. For example, since medical advice can be given by telephone, the doctor is able today to take care of a much greater load of patients because of the telephone than he was able to do before its use became widespread. Another example would be the impossibility of placing police, fire, ambulance or other emergency calls. Other examples can be readily brought to mind.

Accordingly, each of the services covered by the act is vital to the public, some absolutely necessary for public health and safety, others less necessary in that regard, but none the less necessary for the proper functioning of the society which it is part of the state's business to preserve, and those latter singular in the widespread hardships which their cessation causes.

F.

There is no Deprivation of Liberty without due Process of Law.

In the preceding section we have outlined the serious consequences to the public caused by a cessation of the service of any or all of various public utilities. It seems desirable to emphasize again that strikes are prohibited and arbitration compelled only where the strike will result in a stoppage of such service, and where the continuation of the dispute is likely to cause such a stoppage. It is against that background that this law must be considered.

1. Standards Under Which Due Process Is Determined.

There are certain well-recognized principles governing the determination of whether particular legislation is within the bounds of the due process clause of the Fourteenth Amendment. Thus, it is well settled that the police power may be exerted by state legislation, even though the effect may be to invade rights guaranteed by the Fourteenth Amendment, when such legislation bears a real and substantial relation to the public health, safety, and general welfare.

See

Louis K. Liggett Co. vs. Baldridge, 278 U.S. 105, 111-112, 73 L.Ed. 204 (1928).

It is also well settled that the legislature has a large discretion in determining what measures are necessary for protection of the public interest, and that legislation will be invalidated only when it is "plain and palpable" that it has no substantial relation to the protection of the public health, safety, and general welfare.

See

Lawton vs. Steele, 152 U.S. 133, 136, 38 L.Ed. 385 (1894);

Thomas Cusack Co. vs. Chicago, 242 U.S. 526, 531, 61 L.Ed. 472 (1917).

2. Application of Due Process Standards to this Act Leaves No Doubt as to its Constitutionality.

The problem of whether the Wisconsin law offends the due process clause of the Fourteenth Amendment is a dual one. In the first place it will be assumed, *arguendo,* that the right to strike is protected by the Fourteenth Amendment. Secondly, it is well settled that freedom of contract is one of the liberties which may not be taken away without due process of law. The prohibition of strikes and the requirement that disputes be submitted to arbitration will be taken up in that order.[1]

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[1] As a matter of organization, we treat the due process problem as a single problem with a dual aspect. We do not mean to infer that the no-strike provisions of Subchapter III and the compulsory arbitration provisions are not separable. We submit, without discussion, that they are.

(a) *There is no deprivation of the right to strike without due process of law.*

The lower court recognized that public utilities may be regulated virtually as an arm of the state. This need not be elaborated more than by pointing to Chapter 196 of the Wisconsin Statutes in which the rights and privileges of investors are subordinated to the public need. But in their refusal to recognize that the employees of public utilities may be treated as a special class, the appellants seem to ignore the considerations which require special treatment of the utilities themselves. Such treatment is based on the essential nature of the services performed by public utilities, services essential to the preservation of the health, safety and general welfare of the people.

Because its services are essential to the public, a public utility may be compelled to continue in operation.

Sec. 196.03, Wis. Stats.;

Madregano vs. Wisconsin Gas & Electric Co., 181 Wis. 611, 619, 195 N.W. 861 (1923);

State vs. Missouri Southern R. Co., 279 Mo. 455, 214 S.W. 381 (1919);

Missouri Pacific R. Co. vs. Kansas, 216 U.S. 262, 279, 54 L.Ed. 472 (1910);

51 *C.J., Public Utilities,* §98.

The public utility is certainly an industry where—

"* * * * the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied of entering the business either as owner or worker."

See

Wolff Co. vs. Industrial Court, 262 U.S. 522, 541, 67 L.Ed. 1103 (1923).

If the state may compel the continuous operation of the utility as against the owners, it would seem that it can insure its continuous operation by forbidding the employees of a public utility from concertedly engaging in activities which cause a stoppage of service to the public. This argument was put in stronger words by Mr. Chief Justice White in *Wilson vs. New*, 243 U.S. 332, 61 L.Ed. 755 (1917), when he said, at page 351:

> "* * * And finally, to what dersion would it not reduce the proposition that government had power to enforce the duty of operation, if that power did not extend to doing that which was *essential* to prevent operation from being completely stopped. * * * [Emphasis supplied]

To paraphrase the words of Chief Justice White:

If the state may say to the utility: "You have no right to strike," certainly it may say to the employees of the utility: "You have no right to strike."

The relation of patients in a hospital to the employees of the hospital is analogous to the relation of the general public to the employees of a public utility. Like the patient, the general public is dependent on those employees for its health and safety.

In *Society of New York Hospital vs. Hanson*, 59 N. Y.S. (2d) 91 (N.Y. Sup. Ct. 1945), aff'd 73 N.Y.S. (2d) 835 (App. Div., 1947), Judge Pecora enjoined the employees of a charitable hospital from striking to obtain higher wages He did so on the ground that, in the case of a hospital, the policy of favoring the right to strike

is outweighed by considerations of the public welfare, since the result of such a strike is to cause peril of health and safety.

In this connection, a further quotation from *Wilson v. New,* 243 U.S. 332, 352, L.Ed. 755, seems applicable:

> "* * * whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest * * *"

Though not analogous on its facts, the recent case of *Giboney vs. Empire Storage and Ice Company,* 336 U.S. 490, 93 L.Ed. 834 (1949) indicates the present day attitude toward state limitations on the use by a union of its industrial weapons. The Empire Company had refused to agree with the Ice and Coal Drivers Union not to sell ice to non-union peddlers. Such a contract would have been a violation of the anti-trust laws of the State of Missouri and would have subjected the Company to treble damage liability to non-union peddlers. The Union peacefully picketed the Company's place of business. Injunctive relief granted by the courts of Missouri was unanimously upheld by the United States Supreme Court, even though the court recognized that picketing is a form of communication protected by the Fourteenth Amendment as an exercise of free speech.

See also

Carpenters and Joiners Union vs. Ritter's Cafe, 315 U.S. 722, 86 L.Ed. 1143 (1942).

How meager was the interest of the public in the limitation there upheld, when compared to the interest of

the public in limiting the ability of groups of employees to cause a stoppage in the essential service of a public utility, the calamitous results of which we have outlined at pages 25 to 30, supra. How much greater, too, is the interest of the public here than were the considerations of the general welfare which motivated this Court in sustaining comprehensive zoning legislation with its drastic restrictions on the use of private property, restrictions which, but for the dominant interests of the public, would have violated the Fourteenth Amendment.

See

Euclid, Ohio & Ambler Realty Co., 272 U.S. 365, 394-396, 71 L.Ed. 303 (1926).

(b) *Compulsory arbitration is not a deprivation of freedom of contract without due process of law.*

What has been said concerning the reasonableness of the prohibition of strikes in public utilities is applicable to the direction that disputes shall be arbitrated, and need not be repeated here. As has been pointed out, the statute by its terms prohibits strikes and compels arbitration only where a stoppage of essential service will, or is likely to result.

Mr. Justice Holmes, in the course of his dissenting opinion in *Adkins vs. Children's Hospital*, 261 U.S. 525, 570, 67 L.Ed. 785 (1923), said:

> "The criterion of constitutionality is not whether we believe the law to be for the public good. We certainly cannot be prepared to deny that a reasonable man reasonably might have that belief in view of the legislation of Great Britain, Victoria and a number of the States of this Union. * * *"

Compulsory arbitration has long been in effect in all of the Australian states, with the exception of Tasmania and Victoria, and in New Zealand and New South Wales strikes are forbidden in public utilities.

See

Witte, Experience with Strike Legislation Abroad, Annals of the American Academy, 248:138, Nov. 1946.

Ten of the United States have enacted compulsory arbitration laws in the public uitlity field. See Appendix B, infra. On such a record, how can it be said that no reasonable man could consider such legislation "for the public good."

In *Wolff Co. vs. Industrial Court,* 262 U.S. 522 at 534, 67 L.Ed. 1103, the court recognized that, like the other liberties protected by the Fourteenth Amendment, freedoom of contract is subject to a variety of restraints, which, to be valid, must not be arbitrary or unreasonable. There the court unanimously declared unconstitutional a Kansas compulsory arbitration law as applied to a labor dispute in a meat packing concern. In so doing, the opinion left open for future consideration the very legislation concerned here. At page 541, Mr. Chief Justice Taft made the following statement, a part of which we have previously quoted:

> "• • • In (sic) involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied of entering the business either as owner or worker. • • •"

We have already shown that, in the case of a public utility, the "obligation to the public of continuous service is direct." It would not seem necessary to make an argument that a worker makes an "implied" contract with the public when he enters the employ of a public utility, since the expression is but another way of saying that the public may impose a duty on such a worker to settle his disputes peacefully, when not to do so would be to subject the public to peril. That such an obligation may reasonably be imposed in the limited manner of the Wisconsin Act seems to follow from a consideration of the dependence of the public on the service of the public utilities concerned. As Professor Simpson has stated in his article, *Constitutional Limitations on Compulsory Industrial Arbitration,* 38 Harv. L. Rev. 753, 775-776:

> "* * * In the first place, legislation providing for compulsory abritration would seem clearly valid as applied to the public utility industries. These industries supply services of vital importance to the public. * * * It is certainly neither arbitrary nor unreasonable to impose on the employees of such a company a duty not to quit work in concert, but to allow their disputes to be settled by compulsory arbitration * * *."

If the requirement for compulsory arbitration is reasonable in itself, how much more reasonable is it when offered as an alternative to and in lieu of a forbidden strike, with all the serious consequences which such a strike must have. The serious consequences of a stoppage of railroad service were before this Court in *Wilson v. New,* 243 U.S. 332, 61 L.Ed. 755 (1917). Mr. Chief Justice White said in concluding his opinion:

> [243 U.S. 359] "Being of the opinion that Congress had the power to adopt the act in question,

whether it be viewed as a direct fixing of wages to meet the absence of a standard on that subject resulting from the dispute between the parties or as the exertion by Congress of the power which it undoubtedly possessed to provide by appropriate legislation for compulsory arbitration—a power which inevitably resulted from its authority to protect interstate commerce in dealing with a situation like that which was before it—we conclude that the court below erred * * *."

Here we submit that the power of the Wisconsin Legislature to provide for compulsory arbitration to settle labor disputes in public utilities where a stoppage of essential service is threatened "inevitably" results from its authority to protect the health, safety and general welfare of its citizens.

State vs. Traffic Telephone Workers Federation of New Jersey, 142 N.J. Eq. 785, 61 Atl. (2d) 570, 573-4, (1948).

G.

The Law does not Impose Involuntary Servitude on Public Utility Employees.

Section 111.64, Wis. Stats., specifically limits the application of the law in question to workers leaving their jobs in concert.

"Nothing in this subchapter shall be construed to require any individual employee to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. * * *"

The legislature has thus directed the manner in which the statute is to be construed, and it is submitted that

such a mandatory construction forecloses any argument that the statute imposes involuntary servitude.

See

International Union vs. Wisconsin E. R. Board, 250 Wis. 550, 561-563, 27 N.W. (2d) 875 (1947).

In *People vs. United Mine Workers,* 70 Colo. 269, 201 Pac. 54 (1921), the court said at page 56:

> "There is no involuntary servitude under this act. Any individual workman may quit at will for any reason or no reason."

And in *Society of New York Hospital vs. Hanson,* 59 N.Y.S. (2d) 91, where a strike of hospital employees was enjoined, Judge Pecora was careful to state, at p. 97:

> "* * * Such an injunction will not, and cannot, trespass upon the right of the individual to quit his work,—for to give it such effect would be tantamont to giving abhorent sanction to peonage. It is aimed only at concerted activities to bring about and support a strike."

No more is there involuntary servitude under Subchapter 3 of Chapter III than is there involuntary servitude in *the compulsion upon the minority of workers, union or non-union, in a bargaining unit to work under terms agreed upon by the majority.* Such compulsion is effected by virtue of Section 2 of the *Railway Labor Act,* 45 U.S.C.A. §152; Sections 9 and 10 of the *National Labor Relations Act* as amended by the Taft-Hartley Law, 45 U.S.C.A. §§159, 160; and Section 111.06 of the Wisconsin Statutes.

See

Medo Corp. vs. Labor Board, 321 U.S. 678, 683-685, 88 L.Ed. 1007 (1944).

Indeed, Section 10(1) of the Taft-Hartley Law, 45 U. S. C. A. §160(1), permits *injunctiive relief in a federal district court to restrain the minority of the workers in a collective bargaining unit from striking for the purpose of compelling their employer to bargain with them.* The answer to a contention of involuntary servitude there is that any worker is free to quit if he is unsatisfied. That answer is just as true here.

> *State vs. Traffic Telephone Workers Federation of New Jersey,* 142 N.J.Eq. 785, 61 Atl. (2d) 570, 575 (1948).

It is suggested in *Wolff Co. vs. Industrial Court,* 262 U. S. 522 ,541, 67 L.Ed. 1103, that the position of workers in a public utility might be analogized to the enlistment of soldiers and sailors in military service. In that case the court said:

> [262 U. S. 541] " * * * It [the obligation of continous service] can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service." [Bracketed portion supplied]

Indeed no better way for an invading enemy to cripple a region could be suggested than by cutting off its gas, electric, water, transportation and communication services. Thus, it can be said, in a very real sense, that the workers in such utilities are as much guardians of the public safety as would be military personnel. The cases are numerous holding that compulsory military service does not impose involuntary servitude and in *Roberston vs. Baldwin,* 165 U. S. 275, 41 L.Ed. 715 (1897), it was held not to be in-

voluntary service to compel an ordinary seaman in the maritime trade to remain with his ship until the completion of the voyage for which he had signed on. If this analogy were pressed to the limit, it might be argued that the state could compel an individual worker to continue at work in a public utility until adequate provision had been made for his replacement. For the purpose of this argument, however, the analogy need be stressed only to illustrate by comparison how slight is the restraint on the individual's leaving his employment when compared to the weighty considerations which motivated the passage of Subchapter III.

Professor Simpson in *Constitutional Limitations on Compulsory Industrial Arbitration,* 38 Harv. L. Rev. 753, 783-785, takes the position that no problem of involuntary servitude arises in compulsory arbitration statutes, and gives the following illustration:

> "* * * Thus it could hardly be contended that a law forbidding railway employees from leaving their jobs while actually operating trains between stations would be invalid as imposing involuntary servitude. See *Freund, Police Power,* §452."

The operation of a railroad is thus analogized to the operation of a utility. Just as a state could forbid the abandonment of a train in the course of a regular run, so it can forbid the abandonment of a utility in such a way as to stop its operation and cause hardship to those dependent on that operation for their health and safety.

In *Butler vs. Perry,* 240 U. S. 328, 60 L.Ed. 672 (1916), a Florida statute, providing for compulsory labor on county roads and making a failure to work a misdemeanor, was attacked on the ground that it imposed involuntary servitude in violation of the Thirteenth Amendment. This

Court held that the statute did not impose involuntary servitude. The Court noted that the involuntary servitude provisions of the state and federal constitutions were framed in the language of the Ordinance of 1787, and that a provision for compulsory labor on highways was adopted by the Territorial Legislature as early as 1792. At that time there was a paramount necessity that roads be built and maintained. There is an equal necessity today that the services of public utilities be continuous, if the State is to be able to protect the health and the lives of its citizens. Mr. Justice McReynolds, recognizing the essential nature of some services, stated at pages 332-333:

> "* * * the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of *essential* powers. * * *" (Emphasis supplied)

Compare the language of Chief Justice White in *Wilson vs. New*, quoted above on page 33 of this brief.

In the final analysis, the worker who goes out on strike does not purport to be exercising his right to leave his employment and seek work elsewhere. He does not intend to give up his job by striking, and, in fact, he may not be discharged for going out on strike. 29 U. S. C. A. 152(3), 158; Secs. 111.02(3), 111.06(1), Wis. Stats. He desires merely to coerce his employer by economic pressure, and permanent severance of employment is the last thing sought by the strikers, individually or collectively.

A statute which forbids a strike is not, therefore, directed at compelling a continuance of employment repugnant to the individual employee, i.e., servitude. It is directed at preventing cessation of work under a continuing employment relationship.

See

N. L. R. B. v. Mackay Radio & Telegraph Co., 304 U. S. 333, 347, 82 L.Ed. 1381 (1938).

Much of the appellants' argument as to involuntary servitude seems to be based on the idea that this law aims at any concerted cessation of employment. They seem to suggest that a group of employees leaving their jobs permanently to take up work in other industries would be subject to the prohibitions of the law. This argument ignores the very intent of the Act as expressed in Section 111.64, Wis. Stats.:

> " * * * It is the intent of this subchapter only to forbid employees of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, * * * where such acts would cause an interruption of essential service."

Only stoppages under a continuing employment relationship are affected, and then only where the stoppage would cause an interruption of essential service. Prohibition of such stoppages does not impose involuntary servitude.

State vs. Traffic Telephone Workers Federation of New Jersey, 142 N.J. Eq. 785, 61 Atl. (2d) 570, 575.

H.

The Law does not Deny to Public Utility Employees the Equal Protection of the Laws.

It is well settled that the "equal protection" clause of the Fourteenth Amendment protects persons only against arbitrary and unreasonable classifications by state legislatures.

See, e. g.

Tigner vs. Texas, 310 U. S. 141, 146, 147 84 L. Ed. 1124 (1940).

It seems clear that selection of public utility employees for special treatment is eminently reasonable, just as it is reasonable to treat the public utility itself as belonging in a special category for the purposes of regulation.

Munn vs. Illinois, 94 U. S. 113, 24 L.Ed. 77 (1877).

In *Radice vs. People of the State of New York,* 264 U. S. 292, 68 L.Ed. 690 (1924), a New York Statute limiting hours of employment of women in restaurants was sustained against a contention that the statute denied equal protection, since it excepted women employed in hotel restaurants and employees' lunch rooms.

See also

Miller vs. Wilson, 236 U. S. 373, 382, 59 L.Ed. 628 (1915).

(hours of work of women employed in hotels regulated, but employees of boarding and lodging houses excepted);

Bosley vs. McLaughlin, 236 U. S. 385, 394-396, 59 L.Ed. 632 (1915)

(limiting hours of work of women pharmacists and student nurses in hospitals, but excepting graduate nurses).

For a review of cases, see the comprehensive note of Mr. Justice Brandeis dissenting in

Louisville Gas & Electric Co. vs. Coleman, 277 U. S. 32, 42, 72 L.Ed. 770 (1928).

A contention of denial of equal protection was met by Mr. Chief Justice White in *Wilson vs. New,* 243 U. S. 332, 354, 61 L.Ed. 1103 (1917), in the following way:

> "* * * The second rests upon the charge that unlawful inequality results because the statute deals not with all, but only with the wages of employees engaged in the movement of trains. But such employees were those concerning whom the dispute as to wages existed growing out of which the threat of interruption of interstate commerce arose,—a consideration which establishes an adequate basis for the statutory classification."

I.

To Provide in Legislation Enacted for the Protection of the Public the Sanction of State Enforcement and to Reject Enforcement by a Party in Interest Marks a Return to Due Process.

Throughout history, we have seen the necessity of curbing monopolies of wealth. No monopoly of wealth has ever been edured for a great period of time by any intelligent people. It tends to fall of its own weight. We are in

the midst of a new movement, looking toward monopoly of man power. That carries in its train possibilities for evil just as great. In its immediately destructive force, it may be far more devastating. It is not in the nature of mankind to endure it or to tolerate it.

In some states labor unions are expressly exempted from the operation of the statutes directed against monopolies. Secs. 133.04 and 133.05, Wis. Stats., If an express exemption was necessary, then, by a repeal of the exemption they may be subjected to those laws. If they may be subjected to such laws, then their activities may be controlled by restrictions of a less stringent nature. An act limited to the classes whose activities are capable of direct injury to the public, and requiring them to submit to arbitration, and restricting them in the use of the strike, is a salutary measure short of condemnation. This act of the *legislature* may well be deemed a storm signal of the possible extension of the monopoly statutes.

All out war against noncombatants is not constitutionally fostered or protected.

It is fundamental in our law, as traced to England, that the state, through its courts, resolves disputes by judgment, and through its sheriff, aided, when necessary by the *posse comitatus,* executes the judgment. Viewed from the standpoint of remedial law, that is due process.

When the state sets up the labor union, giving it the power to bargain, and, because of its virtual veto on dissenting views, the power to decide the dispute, and, in effect, the power to enforce its decree by its picket line—its own *posse comitatus*—there is an abandonment of due process as known to the common law.

What the state is now doing is resuming the power to adjudicate a dispute, and to enforce its judgment by its executive officers. That is to reinstate due process.

In *Giboney vs. Empire Storage & Ice Co.*, 336 U. S. 490, 93 L.Ed. 834 (1949), it was held that an injunction restraining a union of ice drivers from peacefully picketing an ice company in an effort to compel the company to stop selling ice to nonunion peddlers whom the union had sought to organize with a view to bettering wage and working conditions of the peddlers, was valid as enjoining an offense against a Missouri antitrust law, and not invalid as abridging the right of freedom of speech guaranteed by the Fourteenth Amendment. The court said:

> "While the State of Missouri is not a party in this case, it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. The union has provided for enforcement of its rule by sanctions against union members who cross picket lines. See Associated Press vs. United States, 326 U. S. 1, 19; Fashion Guild vs. Trade Comm'n, supra, at 465; Addyston Pipe &Steel Co. vs. United States, 175 U. S. 211, 242. We hold that the state's power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech or press compels a state to apply or not to apply its antitrade restraint law to groups of workers, businessmen or others. Of course this Court does not pass on the wisdom of the Missouri statute. We hold only that as here construed and applied it does not violate the Federal Constitution."

IV.

A SOUND PUBLIC POLICY AIMED AT THE PROTECTION OF THE NON-COMBATANT PUBLIC IS DEVELOPING THROUGH LEGISLATIVE ACTION AND JUDICIAL ADMINISTRATION

The power of the sovereign, state or nation, to enjoin a strike where public health and safety are endangered is, we think, established by the decision in *United States v. Mine Workers,* 330 U. S. 258, 91 L.Ed. 884 (March 6, 1947).

The following of the United States have enacted compulsory arbitration laws in the public utility field: Florida, Indiana, Kansas, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, Pennsylvania and Virginia. A similar law has been enacted in Hawaii.

These are tabulated in Appendix C herein.

In *State vs. Traffic Telephone Workers Fed. of New Jersey,* 142 N.J.Eq. 785, 61 A2d 570 (1948), Vice Chancellor Bigelow said:

> "The Union suggests that there is an inherent or constitutional right to strike, a right beyond the reach of the State. I know of no such right when the strike will cause great injury to the public. In my opinion, the adoption of the Union's view in this respect might lead to national disaster."

In *State vs. Traffic Telephone Workers' Federation of New Jersey,* 2 N.J. 335, 66 A.2d 616 (May 26, 1949), Chief Justice Vanderbilt, reviewing the foregoing decision, in a very enlightening opinion, said:

> " * * * Where by reason of a strike, work stoppage or lockout the flow of the services of any of these es-

> sentials of community life is halted or impaired, the state has not only the right but a pressing duty to step in and prevent the continuance of such stoppage or impairment and to take appropriate measures to restore them. If instead of a stoppage or curtailment of essential services there is an imminent danger of their being halted or curtailed, the State has the right as well as the obligation of preventing the occurrence of any such catastrophe." (Citing *U. S. v. United Mine Workers,* supra.)

He held the act involved in that case to be unconstitutional for lack of the prescription of definite standards in delegating legislative authority; but in so doing pointed out that this had been anticipated in similar legislation in other states, including Wisconsin. It is clear from his opinion that, if he were passing on the Wisconsin law, he would have upheld it.

After an amendment, the New Jersey statute was upheld in *New Jersey Bell Tel. Co. vs. Communications Workers, etc.,* ..... N.J. ....., 75 A.2d. 721, decided October 2, 1950 This decision is very carefully worked out, and is particularly interesting for its discussion of the relationship between the state act and the Taft-Hartley Act.

The last decision in New Jersey was cited and quoted in *Wisconsin Employment Relations Board vs. Milwaukee Gas Light Company,* 258 Wis. 1, 44 N.W. (2d) 547, decided on November 8, 1950, which is No. 438 on the current calendar.

A Michigan act of the same general character was held bad on other grounds in *Local 170 Transport Workers Union vs. Gadola,* 322 Mich. 332, 34 N.W. (2d) 71, decided September 8, 1948. However, the court clearly indicates the view that, but for the objection already mentioned, not here present, the act would have been upheld.

V.

THE WISCONSIN LAW IS NOT IN CONFLICT WITH THE TAFT-HARTLEY ACT

The basis for congressional action is the interstate commerce clause. Its express purpose is to protect the free flow of interstate commerce. Congress has no power to police the states' control over their utilities. That power rests with the states. In fact, the states exercise such powers on the theory that the utilities are state agencies. They perform functions which the states might perform directly rather than through agencies to which they delegate their own powers. We respectfully submit that Congress can exercise no more control over a state public utility agency than it could over the state itself.

Grant that Congress may take proper measures to insure the flow of commerce. Its powers end there. It has no police power, pure and simple. It cannot dictate to the state how its police power over its own utilities shall be exercised.

Nor can there be any no man's land in which there can be no control. The federal government is not equipped to exercise any such control.

From day to day, we have emphasized the relationship between the wages paid by an employer and the employer's earnings. In the case of public utilities, the power to regulate rates rests with the state. In construing the federal law, the presumption should be indulged that *Congress did not intend to interfere with the states' control in so vital a matter*. The anti-strike law is not directly related to interstate commerce. It is directed primarily to safeguarding the interests of the people of the state and insuring to them adequate service, which, in this field, means uninterrupted service. Uninterrupted service will promote the flow of interstate commerce.

The people of the state possess the ultimate property in and to all lands within its jurisdiction.

Section 3 of Article IX of the State Constitution, which was approved when the state was admitted to the union, reads as follows:

> *"Ultimate property in lands; escheats.* Section 3. The people of the state, *in their right of sovereignty, are declared to possess the ultimate property, in and to all lands within the jurisdiction of the state;* and all lands the title to which shall fail from a defect of heirs shall revert or escheat to the people." (Italics ours)

This is the temple bar, which is dropped when the national government attempts to enter the state. The sovereign nation may enter only if the bar be lifted by the sovereign state.

We have already called attention to the franchise area served by the Gas Company. The state has undertaken to see that gas service is rendered throughout this franchise area of five hundred square miles to a population of nearly eight hundred thousand, and to over two hundred thousand actual customers. If the federal law is to be construed as interfering with the state's control over the wages paid by that utility, then the state is deprived of all effective control over the utility, and no comparable control is pretended to be vested in the national government. The state is still a sovereign entity. Any attempt by the national government to enter this field would be usurpation. However, under a proper interpretation of the federal act, that would not follow. The state is still sovereign in the field covered by the Public Utility Anti-Strike Law.

If we assume that Congress has the power, we submit that, on a proper construction of the Taft-Hartley Act, it has not attempted to preempt this field.

New Jersey Bell Tel. Co. vs. Communications Workers, etc., ... N.J. ....., 75 Atl. 2d 721, decided October 2, 1950.

Wisconsin Employment Relations Board vs. Milwaukee Gas Light Company et al, 258 Wis. 1, 44 N.W. (2d) 547, advance sheets.

The Wisconsin Law is not in conflict with the Taft-Hartley Law. In its scope and purpose, Subchapter III goes beyond the scope and purpose of the Taft-Hartley Law. The fact must be borne in mind in order to make clear the exact principles which must be applied in determining whether the act conflicts with the Taft-Hartley Law, specifically in order to make it clear that it is the principle of cases such as *Allen Bradley Local vs. Wisconsin E. R. Bd.*, 315 U. S. 740, 86 L.Ed. 1154 (1942) and *Hill vs. Florida*, 325 U. S. 538, 89 L.Ed. 1779 (1945) which is applicable here, rather than the principle laid down in *Bethlehem Steel Co. vs. New York State Labor Relations Board*, 330 U. S. 767, 91 L.Ed. 1234 (1947).

The latter case held that the New York Labor Board might not certify a foreman's union as a bargaining unit where the refusal of the National Labor Relations Board to certify foremen's unions demonstrated a federal policy against such certifications. The case is concerned with concurrent jurisdiction of state and federal labor boards over matters which either is empowered to entertain and decide. Certain dictum in the decision has caused confusion and considerable diversity of interpretation; compare, e. g., *LaCrosse Tel. Co. vs. W. E. R. B.*, 251 Wis. 583 (1947) with *Pittsburgh Rys. Co. Substation Operators and Maintenance Employees' case*, 357 Pa. 379, 54 Atl. (2d) 891 (1947). Perhaps the diversity has been dispelled by the recent decision of this Court in *LaCrosse Telephone Corp. vs. Wisconsin E. R. Board*, 336 U.S. 18,

93 L.Ed. 463 (1949), but that decision would not preclude action where, as here, the Taft-Hartley Law does not purport to regulate the aspects of the employer-employee relations regulated by Subchapter III.[1]

In the *Bethlehem Steel Co.* case, Mr. Justice Jackson stated:

[330 U. S. 767, 773],

> "In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee relation out of which such interferences arise. It has dealt with the subject of relationship but partially, and has left outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state. Such was the situation in *Allen-Bradley Local vs. Board,* 315 U. S. 740, where we held that employee and union conduct over which no direct or delegated federal power was exerted by the National Labor Relations Act is left open to regulation by the state. * * * "

In the very next sentence he continued:

> " * * * However, the power of the state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.' *Hill vs. Florida,* 325 U. S. 538, 542. * * * "

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[1] We do not ignore the fact that secs. 201-204 of the Taft-Hartley Law, 29 U. S. C. A. secs. 171-174, provide for federal conciliation services, but consider that such provision represents no attempts at regulation by Congress and so is of no concern here. In addition, the provisions of the Taft-Hartley Law contemplate, by their terms, corresponding state services, and in fact, the federal service is directed to avoid atempting to mediate disputes which would have only a minor effect on interstate commerce if state conciliation services are available. Sec. 203(b), 29 U. S. C. A. §173(b).

That latter quotation indirectly states the question which must be dealt with by this court.

A.

The Prohibition of Strikes in this Subchapter Is Not in Conflict With the Taft-Hartley Law.

In *Allen-Bradley Local vs. Wisconsin Employment Relations Board,* 315 U. S. 740, 86 L.Ed. 1154 (1942), the Supreme Court of the United States affirmed a decision of the Wisconsin Supreme Court, sustaining an order of the Wisconsin Employment Relations Board against Local 1111 of the United Electrical Workers, directing the local to stop mass picketing at the Allen-Bradley plant, the Local being admittedly under the general jurisdiction of the National Relations Board by virtue of the National Labor Relations Act. Mr. Justice Douglas at pages 747 through 749 discussed at some length the area in which the State might take action under its police power. At page 750 he stated.

[315 U. S. 740, 750]

"* * * the federal Act does not govern employee or union activity of the type here enjoined. * * *"

Similarly, the Taft-Hartley Law does not purport to govern exclusively employee or union activity of the type prohibited by Subchapter III. It is true that the Act prohibits certain strikes; notably, strikes by a non-certified union and strikes affecting all or a substantial part of an industry engaged in interstate commerce. 29 U. S. C. A. §§176-180; but, there is no implication to be found in the Act suggesting that there is an implied congressional approval of all other strikes. The implication is, in fact, quite to the contrary. Section 13 of the Taft-Hartley Law, 29 U. S. C. A. §163, states:

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike *or to affect the limitations or qualifications on that right.*" (Emphasis supplied)

We are not to be left to conjecture as to the interpretation to be given to that section of the Taft-Hartley Law. The recent case of *International Union vs. Wisconsin E. R. Board,* 336 U. S. 245, 93 L.Ed. 651, 23 L. R. R. M. 2361 (1949) (the Briggs-Stratton case) held that the Wisconsin Employment Relations Board could order the union to cease and desist from instigating intermittent and unannounced work stoppages. In the course of the opinion, Mr. Justice Jackson, speaking for a majority of the court, said:

[336 U. S. 245, 258-9]

" * * * Unless we read into §13 words which Congress showed no intention of including, *all that this provision does is to declare a rule of interpretition for the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other laws. It did not purport to modify the body of law as to the legality of strikes as it then existed. This Court less than a decade earlier had stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal.* It had unanimously adopted the language of Mr. Justice Brandeis that 'Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.' Dorchy vs. Kansas, 272 U. S. 306, 311, 71 L.Ed. 248, 269, 47 S. Ct. 86. *Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest.* Duplex Printing Press Co. vs. Deering, 254, U. S. 443, 488, 65 L.Ed. 349, 365, 41 S. Ct. 172, 16 A. L. R. 196. This court

has adhered to that view. Thornhill vs. Alabama, 310 U. S. 88, 103, 84 L.Ed. 1093, 1102, 60 S. Ct. 736. The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining * * * " (Emphasis supplied)

The appellants have argued that the act is in conflict with Section 7 of the Taft-Hartley Law, 29 U.S.C.A. §157, which gives employees the right to engage in concerted activities. The argument is that a strike for lawful purposes and conducted by lawful means is a concerted activity within the meaning of that section.

In the lower court, the appellants cited Mr. Justice Jackson's opinion in the Briggs-Stratton case setting out the purpose of Section 7. Examination of that quotation does not lead to the interpretation that the appellants would give to it because the appellants ignore the significance of the word "merely." In speaking of the purpose of Section 7, Justice Jackson stated:

[336 U. S. 245, 258]

" * * * No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy *merely* because they are undertaken by many persons acting in concert. * * * "

It is clear that Subchapter III does not purport to reapply the long defunct theory of conspiracy to concerted activities of public utility employees. Subchapter III merely recognizes that when a group of utility employees strike great hardship and danger is threatened to the public.

In *Allen Bradley Local vs. Wisconsin E. R. Board,* 315 U. S. 740, 86 L.Ed. 1154 (1942), the Supreme Court said:

[315 U. S. 740, 749, 750]

" * * * the intention of Congress to exclude the States from exercising their police power must be clearly manifested."

This statement was quoted with approval in the Briggs-Stratton case. 336 U. S. 245 ,253. If the declaration of Subchapter III that certain strikes are illegal is an otherwise valid exercise of the state's police power, there is no conflict with the "concerted activities" clause. As was said in *N. L. R. B. vs. Peter C. K. Swiss Chocolate Co.,* 130 F. (2d) 503, 506 (C. C. A. 2d 1942), that clause "does not excuse 'concerted activities' themselves independently unlawful." And in *International Union vs. Wisconsin E. R. Board,* 250 Wis. (1947), Justice Fowler said, in referring to Section 7:

[250 Wis. 550, 568]

" * * * That section does not authorize employees to use concerted activities which are in violation of law. The activities which they are authorized to use in concert are those which are lawful. * * * The same is in effect held in Allen-Bradley Local vs. Wisconsin E. R. Board, 315 U. S. 740. * * * "

If Congress has recognized the right to strike, this Court has made it clear that the right is not absolute even if the methods or tactics can not be condemned. The strike may be condemned because of its results. That is clear from the following reference in the *Briggs & Stratton* case to the language of the *Fansteel* case.

[336 U. S. 245, 259-260]

"As to the right to strike, however, this Court, quoting the language of §13, has said, 306 U. S. 240, 256, 83 L.Ed. 627, 635, 59 S. Ct. 490, 123 A. L. R. 599, 'But this recognition of "the right to strike" plainly contemplates a lawful strike,—the exercise of the unquestioned right to quit work,' and it did not

operate to legalize the sit-down strike, which state law made illegal and state authorities punished. National Labor Relations Bd. vs. Fansteel Metallurgical Corp., 306 U. S. 240, 83 L.Ed. 627, 59 S. Ct. 490, 123 A. L. R. 599. *Nor, for example, did it make legal a strike that ran afoul of federal law,* Southern S. S. Co. vs. National Labor Relations Bd., 316 U. S. 31, 86 L.Ed. 1246, 62 S. Ct. 886; *nor one in violation of a contract made pursuant thereto,* National Labor Relations Bd. vs. Sands Mfg. Co., 306 U. S. 332, 83 L. Ed. 682, 59 S. Ct. 508; *nor one creating a national emergency,* United States vs. United Mine Workers, 330 U. S. 258, 91 L.Ed. 884, 67 S. Ct. 677." (Emphasis supplied)

B.

The Provisions for Compulsory Arbitration in this Act Are Not in Conflict With the Taft-Hartley Law.

Section 7 of the Taft-Hartley Law, 29 U. S. C. A. §157, grants to employees the right to bargain collectively. Examination of the conciliation and compulsory arbitration provisions of Subchapter III demonstrates that this right is in no way restricted by those provisions. Section 111.56, Wis. Stats., states:

> "During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other."

And Section 111.59, Wis. Stats., referring to the arbitration order, states:

> " * * * but such order may be changed by mutual consent or agreement of the parties * * * "

Thus, Subchapter III contemplates that the employer and the representative of the employees are free to meet at any time, both during and after conciliation or arbitration proceedings, to settle their differences by collective bargaining. The entire procedure of Subchapter III is subject to and inferior to collective bargaining. It is not contended, indeed the provisions of Subchapter III forbid, that the pendency of conciliation or arbitration proceedings should be interpreted as furnishing a defense to the employer or the employees in an unfair labor practice proceeding brought before the National Labor Relations Board under Section 8(a)(5), 29 U.S.C.A. §158(a)(5), for refusal to bargain collectively.

Nor can it be successfully argued that the Taft-Hartley Law contemplates that employees shall never work except under terms agreed upon by collective bargaining. Section 8(d), 29 U. S. C. A. §158(d) states:

> "For the purposes of this section, to bargain collectively is the performance of a mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.* * * *" (Emphasis supplied)

Experience has shown that collective bargaining does not always prove successful. The italicized portion of the above quotation states clearly that there need never be agreement. All that the Taft-Hartley Law purports to

do is to insure that the parties get together and attempt in good faith to iron out their differences. It is silent as to the procedure to be followed when the parties have reached an impasse. It is at this point that strikes are likely to occur, that "primitive methods of trial by combat" are employed. The result may be that the employer accepts the union's terms or the union accepts the employer's terms, or a compromise is reached which favors the stronger combatant. In any event, collective bargaining has not been the means of arriving at the final terms. Nor does the Taft-Hartley Law contemplate that it need be.

The conciliation and compulsory arbitration proceedings of Subchapter III can come into operation only where the collective bargaining machinery has broken down and an impasse has been reached. Where the boundaries of the field of regulation of the Haft-Hartley Law have been reached, the state has felt it necessary in the public interest that the hitherto peaceful disputants should not enter into a no-man's land of unrestricted industrial warfare, to be carried on at the expense of the public health and safety. It compels the parties to arrive at temporary terms by "processes of justice," at the same time leaving the way open for peaceful discussions. Indeed, such a procedure would seem to be more conducive to a resumption of collective bargaining processes than the alternative unrestricted warfare with its consequent strengthening of antagonism and ill will.

C.

The Appellants' Argument as to Conflict With the Taft-Hartley Law Ignores the Peculiar Position of the Public Utility.

The argument seems to be that depriving employees of the ability to strike and substituting compulsory arbitration has such an effect on the processes of collective bargaining as to stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Hill vs. Florida, 325 U. S. 538, 542, 89 L.Ed. 1779 (1945).

The appellants state, and we do not deny, that the purpose of the Wagner Act carried over into the Taft-Hartley Law was to enable employees to join together so that they would be on an equal footing with the employer with equal economic power. While the Wagner Act may have eventually worked to give the employees a stronger position than the employer, still the avowed purpose of the Taft-Hartley Law was to bring the relative powers into equilibrium.

Some of the rights guaranteed by Section 7 may be capable of exact definition. See e. g. *Hill vs. Florida,* supra. The words "bargain collectively," however, are not words of art, but are merely an expression of an idea which must be interpreted in the light of the purposes and objectives which Congress contemplated. The declared purpose of Congress was to promote the flow of commerce by "restoring equality of bargaining power between employers and employees." 29 U. S. C. A. §151.

In applying this purposes' and objectives' test to Subchapter III the appellants ignore, as they have ignored elsewhere, the peculiarity of the public utility. It may well be that as applied to the usual situation of a private employer, substituting compulsory arbitration for strikes would work a hindrance to the accomplishment of Congressional objectives. But not so in the case of the public utilities. *In the case of public utilities the substitution of compulsory arbitration for strikes, besides being a salutory measure for the protection of the health, welfare and life of the public, operates to promote the balance of power which the Taft-Hartley Law was designed to create.*

We need not repeat the citation of authorities to the effect that the public utility must furnish continuous service. The public utility may not lock out its employees. As we have previously stated, *the public utility may not strike.* The balance of power which Congress tried to create does not exist if the employees are able to strike, but the employer is not able to strike. All of the economic power rests with the employees. As a matter of fact, prior to the passage of Subchapter III, the union was in the position of a bargainer with the power of eminent domain.

But subchapter III balances that otherwise unbalanced position. Both sides come to the collective bargaining table with the equal right in the background to resort to arbitration if the demands of the other are out of line. Thus Subchapter III fosters the purposes and objectives of Congress in enacting the Taft-Hartley Law.

D.

Subchapter III Is an Exercise of the Sovereign Power of the State, and, as Such, Should Not Be Held Invalid Unless Clearly in Conflict With the Taft-Hartley Law.

We have referred to the language in the *Allen-Bradley* case to the effect that the intention of Congress to exclude the exercise of the State's police power must be clearly manifested. We would contend for a further rule of construction here.

It is clear that Congress did not intend the Taft-Hartley Law to be applicable to activities of the State. Section 2(2), 29 U. S. C. A. §152(2), excludes from the definition of "employer" " * * * any State or political subdivision thereof." It is apparent that if the State or the City of Milwaukee were the owner of the respondent Milwaukee Gas Light Company no question of conflict with the federal law would arise. Admittedly the respondent cannot here claim to come under the specific immunity of Section 2(2), but Section 2(2) is demonstrative of the fact that the Taft-Hartley Law was not intended by Congress to interfere with the exercise by the states of their sovereign powers.

The State of Wisconsin exercises extensive control of the respondent through its agency, the Public Service Commission. The public utility exercises a public function. It is not a private corporation except in a technically legal sense.

See

Shepard vs. The Milwaukee Gas Light Co., 6 Wis. 526, 534 (1858).

The State of Wisconsin directs the price it shall pay for the products it purchases and the rates it shall charge for its service. It is an arm of the State. Its employees are, in a sense, public employees.

In enacting Subchapter III, the State has done more than exercise its police power. It has exercised its sovereign power. Even if we can not rely on the exact words of the Taft-Hartley Law, we can at least rely on its expressed intention to keep hands off of the exercise of the sovereign powers of the states.

We do not have here the question of whether the Act of Congress should apply to state owned enterprises, a question which was before the United States Supreme Court in *United States vs. California,* 297 U. S. 175, 80 L.Ed. 567 (1936). Here Congress has specifically exempted the states. We contend not only that such a specific exemption shows an intention of Congress not to interfere with the sovereign functions of the state, but also that the Taft-Hartley Law should not be interpreted so to interfere, even in the absence of such a Congressional expression of intention. See the quotation from *Butler vs. Perry* which we have set out on page 42, supra. Where, as here, there is a quasi-pubic corporation, a virtual arm of the State, organized for the furnishing of essential services to the citizens of the State, a function which the State or its political subdivisions could perform directly, and where Congress has shown an intention to exclude the states or their political subdivisions, any exercise of the sovereign powers of the State should not be found invalid unless the conflict with federal law is clear and unmistakable.

VI.

THE JUDGMENT IS NOT APPEALABLE TO THIS COURT UNDER SECTION 1253 IN VIEW OF THE FACT THAT, AS WE SUBMIT, IT NEITHER GRANTS NOR DENIES EITHER AN INTERLOCUTORY OR A PERMANENT INJUNCTION

The amended complaint describes this as "a suit of a civil nature seeking an injunction and a declaratory judgment * * *" (R. 1, par. 1).

The injunction prayed for is a "permanent injunction enjoining and restraining the defendants and their agents from taking steps to enforce the penalties of Subchapter 3, Chapter 111, Wisconsin Statutes, 1947, or other provisions thereof * * *" (R. 12, par. (d))

The declaratory relief prayed for is that:

> "(e) This court issue a judgment declaring that the provisions of sub-chapter 3, Chapter 111 of the Wisconsin Statutes of 1947," in certain respects, "are void, illegal, unenforceable and repugnant to the United States Labor-Management Relations Act of 1947, and to the Constitution of the United States." (R. 12, par. (e))

In other words, the plaintiffs sought to have the Public Utility Anti-Strike Law declared invalid and its enforcement enjoined.

The Wisconsin Employment Relations Board is charged with the enforcement of that act. On October 3, 1949, the Board issued an order directing the Company and the Union to join in striking names from a given list of persons to act as arbitrators (R. 39, par. 26; R. 15, Ex. B).

On October 4, 1949, the plaintiffs (appellants) filed their complaint in this action.

On October 5, 1949, the Union went out on strike (R. 42, par. 30).

On the same day, the Board commenced an action in the Circuit Court for Milwaukee County, Wisconsin, against the Company and certain of its officers, and against the Union and certain of its members, to enjoin the strike, and procured an order to show cause why a temporary injunction should not issue.

Negotiations were reopened, and, On October 6, 1949, the Union and the Company agreed on wages, hours and other conditions of employment, but did not come to an agreement on a pension plan which was under discussion (R. 43, 44, pars. 33, 34). The strike was called off and the employees returned to work (Appellants' Brief p. 5).

The case was tried in the District Court on November 28, 1949 (R. 84). The record does not show that any impasse or stalemate arose in respect to the pension plan at any time thereafter (R. 43, 44, pars. 33, 34). The plaintiffs offered no proof of any impasse or stalemate, although they had the right so to do (R. 34, Stipulation par. III).

The decision, announced on April 28, 1950, directed that the findings be submitted to their counsel before signature (R. 66). They made no request to have an injunction embodied in the judgment.

Hence it follows that, when the case went to judgment, the plaintiffs were no longer asking for an injunction. All that they were asking for was a declaratory judgment holding the anti-strike law invalid.

We submit that the plaintiffs are in no position to claim that the judgment in fact operates to grant or deny either an interlocutory or a permanent injunction within the meaning of Section 1253 and is not appealable.

That section reads as follows:

> "§1253. Direct appeals from decisions of three-judge courts.
>
> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

It is respectfully submitted that this was not a judgment granting or denying an injunction, and is not appealable to this court under Section 1253; and that the appeal should, therefore, be dismissed.

VII.

THE CONTROVERSY HAS BEEN SETTLED AND THE ISSUES RAISED ARE NOW MOOT

We are very much in the same position as a party to a money judgment which has been paid voluntarily and satisfied after an appeal. It would be his duty to advise the court of that development. We think it our duty to advise the court of an analogous situation presented in the action at bar.

Because of that, we now suggest these facts, proof of which we respectfully ask leave to submit.

A contract disposing of all the matters in dispute, except for a certain pension plan, was entered into on October 6,

1949, which contract remained in force until June 1, 1950. At that time that contract was reopened for negotiations, which continued without stalemate or impasse until September 11, 1950, when a new contract was entered into, which by its terms shall remain in force until June 1, 1951, and from year to year thereafter unless notice of a desire to modify be given on or before April 1st of any year.

On August 14, 1950, a contract was entered into between the parties embodying a pension plan, which, by its terms, is to remain in effect until midnight of December 31, 1952. Under its terms, either party may request renegotiation of the provisions of the plan on and after December 31, 1952.

That contract contained the following provision:

> "(b) During the period of three (3) years from January 1, 1950, neither the Company nor the Union shall demand any change, modification or amendment in this pension agreement, nor shall either party be required to bargain with respect to pensions in any form whatsoever; nor shall a change, modification or amendment to this agreement be an objective of or be stated as reason for any strike or lock-out or other exercise of economic force or threat thereof by the Union or the Company; nor will the Union sanction or condone any strike or other exercise of economic force or threat thereof for the purpose of securing any change, modification or amendment to this pension agreement."

If permitted to file such proof, we will ask for a dismissal of the appeal.

CONCLUSION

We respectfully submit:

1. That if the appeal be not dismissed, the judgment should be affirmed on the grounds stated in the majority opinion in the District Court.

2. That if the appeal be not dismissed or the judgment affirmed on the foregoing ground, the judgment should be affirmed on the pleadings and the undisputed evidence for the reason that the Wisconsin Public Utility Anti-Strike Law is valid.

3. That the appeal should be dismissed for the reasons that the judgment is not appealable, and that there is no longer any controversy between the parties.

Respectfully submitted,

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APPENDIX A

THE WISCONSIN LAW INVOLVED

CHAPTER 111
EMPLOYMENT RELATIONS

* * *

SUBCHAPTER I.
EMPLOYMENT PEACE ACT

111.01 Declaration of policy. The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this chapter is enacted, is declared to be as follows:

(1) It recognizes that there are three major interests involved, namely: That of the public, the employe, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration.

It is also recognized that whatever may be the rights of disputants with respect to each other in any controver-

sy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion.

(3) Negotiation of terms and conditions of work should result from voluntary agreement between employer and employe. For the purpose of such negotiation an employe has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.

(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.

While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat.

* * * *

111.03 Employment relations board. [The board is created under this section.]

* * *

SUBCHAPTER II.

FAIR EMPLOYMENT

* * *

SUBCHAPTER III.
PUBLIC UTILITIES

* * *

111.50 Declaration of Policy. It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employes which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employes, and to provide settlement procedures for labor disputes between public utility employers and their employes in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

111.51 Definitions. When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state. This subchapter does not apply to railroads nor railroad employes.

(2) "Essential service" means furnishing water, light, heat, gas electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin employment relations board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

111.52 Settlement of Labor Disputes Through Collective Bargaining and Arbitration. It shall be the duty of public utility employers and their employes in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

111.53 Appointment of Conciliators and Arbitrators. Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties

of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the board by section 20.585 upon such authorizations as the board may prescribe.

111.54 Conciliation. If in any case of a labor dispute between a public utility employer and its employes, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employes are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

111.55 Conciliator Unable to Effect Settlement; Appointment of Arbitrators. If the conciliator so named is unable to effect a settlement, of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continu-

ation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute.

111.56 Status Quo to be Maintained. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other.

111.57 Arbitrator to Hold Hearings. (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in disputes. Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved;

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The overall compensation presently received by the employes having regard not only to wages for time actually worked but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stabili-

ty of employment enjoyed by the employes. The foregoing enumeration of factors shall not be construed as precluding the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

111.58 Standards for Arbitration. The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

111.59 Filing of Order With Clerk of Circuit Court; Period Effective; Retroactivity. The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit court of the county wherein the dispute arose or where the majority of the employes involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall continue effective for one year from that date, but such order may be changed by mutual consent or agreement of the

parties. No order of the arbitrators relating to wages or rates of pay shall be retroactive to a date before the date of the termination of any contract which may have existed between the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be matter for collective bargaining or decision by the arbitrator.

111.60 Judicial Review or Order of Arbitrator. Either party to the dispute may within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review herein above set forth and shall affirm, reverse, modify or remand such order to the arbitrator as to any issue or issues for such further action as the circumstances require.

111.61 Board to Establish Rules. The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

111.62 Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty. It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employes when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to institgate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63 Enforcement. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 Construction. (a) Nothing in this subchapter shall be construed to require any individual employe to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this sub-

chapter only to forbid employes of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65 Separability. It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

* * *

APPENDIX B

WISCONSIN DECLARATORY JUDGMENTS ACT

The declaratory judgments act, so far as material, reads as follows:

"269.56 **Declaratory Judgments Act.** (1) Scope. Courts of record within their respective jurisdiction shall have *power to declare rights, status and other legal relations whether or not further relief is or could be claimed.* No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

"(2) Power to construe, etc. *Any person* interested under a deed, will, written contract or other writ-

ings constituting a contract, or *whose rights, status or other legal relations are affected by a statute,* municipal ordinance, contract or franchise, *may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.*

* * *

"(5) Enumeration not exclusive. The enumeration in subsections (2), (3) and (4) does not limit or restrict the exercise of the general powers conferred in subsection (1) in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

* * *

"(11) Parties. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the right of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a *party,* and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be *served with a copy of the proceeding and be entitled to be heard.*

* * *

"(16) Short Title. This section may be cited as the 'Uniform Declaratory Judgments Act.'" [Italics ours]

APPENDIX C

Resume of Compulsory Arbitration and Related Laws of Various States in the Public Utility Field.

1. *Florida:*

Chapter 23911 of Laws of 1947 provides for conciliation and compulsory arbitration. Lockout and strikes are cause for damages, and violations may be enjoined.

2. *Indiana:*

Chapter 341 of Acts of 1947 is substantially similar to Florida law.

3. *Kansas:*

General Statutes Annotated, 1935, Section 44-606, provides that it shall be unlawful, willfully to hinder, delay, limit, or suspend continuous and efficient operation of a public utility for the purpose of evading the law. The State Labor Commissioner is empowered to investigate and settle any controversy which interferes with orderly operation of public utilities and may take over and operate public utility in which suspension of operations affects the public welfare.

4. *Massachusetts:*

Chapter 596 of Acts of 1947 provides for voluntary arbitration. If dispute unsettled, governor may declare emergency and make arrangements for continued service. Governor may seize plant, and strikes in a plant so seized are unlawful, and the governor may institute injunctive relief. During declared period of emergency, whether plant seized or not, wages and hours are to remain static unless emer-

gency board of arbitrators appointed by governor recommends changes, in which event governor may impose changes.

5. *Michigan:*

Section 13 of Act No. 318 of 1947. If parties fail to submit dispute to voluntary arbitration, an arbitration board is appointed. Terms and conditions of employment are set by order of board and are binding on parties. Strikes are forbidden during arbitration proceedings and during effective period of board's order. Injunctive relief is afforded to anyone injured by violations of the act.

6. *Missouri:*

H. B. 180, Laws of 1947, establishes State Board of Mediation. Compulsory arbitration may be ordered when voluntary arbitration fails. If stoppage of service threatened, governor may seize plant. Strikes during seizure are prohibited. Injunctive relief is afforded.

7. *Nebraska:*

R. S. Supp. 1947, 48-802 through 48-823. Court of Industrial Relations established with jurisdiction over disputes in state-owned and privately-owned utilities. Unsettled disputes must be submitted to court. Strikes and lockouts are prohibited. Orders of court are binding on parties. Failure to obey orders constitutes contempt.

8. *New Jersey:*

Chapter 38, Laws of 1946, allows governor to seize utility if dispute not settled and stoppage or service threatened. Chapter 75, Laws of 1947, provides for compulsory arbitration, and penalties for violation

of arbitration award. Strikes and lockouts during state seizure. State officers may enjoin violations of law. Chapters 47, 75 Laws 1949, Chapter 308 Laws 1950.

9. *Pennsylvania:*

Act No. 485, Laws of 1947, is substantially similar to Subchapter III of Chapter 111.

10. *Texas:*

Chapter 84, Laws of 1947, declares it to be the public policy of Texas that continuous service by public utilities is absolutely essential to life, health, and safety of all the people, and provides it shall be unlawful for any persons to picket the plant, premises, or any part of a public utility, or to intimidate, threaten or harass an employee of a public utility with intent to disrupt service or prevent maintenance thereof; district courts are authorized to enjoin such unlawful acts. Further, it is made duty of governor to exercise all of the powers available under constitution or laws of Texas to protect public from dangers incident to stoppage or interruption in the service of a public utility because of violation of the Act.

11. *Virginia:*

Code of 1950, Section 40-78, provides it shall be unlawful for a public utility or a union to engage in a lockout, strike, or work stoppage before certain conditions are complied with. If parties are unwilling to submit a dispute to voluntary arbitration, governor is empowered to take possession of the utility or the use of, and operation by, the commonwealth. It is unlawful to interfere with governor's efforts to secure services of officers or employees of a utility or any other person in order to continue the operation of the utility on behalf of commonwealth. Picketing

of work engaged in by persons employed by state is declared to be unlawful obstruction of the exercise of an essential function of the government.

12. *Hawaii:*

Revised Laws of Hawaii, 1945, Sections 4161-4174, declare it is the duty of a public utility and its employees and their representatives to use processes of collective bargaining in settlement of all disputes between utility and its employees without resort to lockout or strike. Strikes and lockouts are prohibited, until notices are given and hearings held as specified in Act, where interruption of public utility service is threatened or caused.